No. 3177

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In the United States
Circuit Court of Appeals
For the Ninth Judicial Circuit

PUGET SOUND NAVIGATION COMPANY, a corporation,

Appellant,

vs.

CANYON LUMBER COMPANY,
PORT BLAKELY MILL COMPANY, and
GUS SMITH and CECILIA SMITH,

Appellees.

APPELLANT'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

IRA BRONSON,
J. S. ROBINSON,
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Proctors for Appellant.

THE ARGUS PRESS SEATTLE

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STATEMENT OF THE CASE.

On the morning of October 20, 1918, a scow belonging to the Canyon Lumber Company laden with lumber belonging to the Port Blakely Mill

Company, and under tow of the tug "Klickitat," belonging to Gus Smith and Cecilia Smith, was run down by the Puget Sound Navigation Company's steamer "Indianapolis," in Seattle harbor. The Canyon Lumber Company libeled the "Indianapolis" and the Mill Company filed an intervening libel. The Puget Sound Navigation Company claimed its vessel, alleged in its answers that the collision occurred through the fault of the "Klickitat" and libeled the said tug under Admiralty Rule 59. Its owners filed claim and made up issues by answer.

When the matter came on for trial before the Hon. Jeremiah Neterer, Judge of the District Court, it was stipulated that the damages to the Libelant and Intervening Libelant were as alleged in their libels, and that in view of the general allegations of the pleadings, the respective parties might introduce their evidence of fault, the Court to determine at the close of all the evidences upon whom the loss should fall. (Apos. 6.)

It appeared from the evidence submitted on behalf of the Libelants and on behalf of the Claimants of the "Klickitat" that she left Port Blakely at 4:40 A. M., bound for Pier 2 in Seattle. (9). She had in tow, on a three hundred foot hawser, (18), a scow, 30x119 feet (60), to which were coupled two floats 80 feet long (60), one behind the other (9). She proceeded steadily at a little less than four miles per hour. She was manned by her Master, Houchen, and by one deck-hand,

Melgard, who had been so employed for two weeks (25), his previous and only other maritime experience consisting of six months' service on freight vessels in Norway about thirteen or fourteen years ago. (30, 32).

The tug with her long tow passed about midway between the buoy and Duwamish Head at about a quarter to seven (10). At this point she ran into banks of fog, some of which were thick, (21, 22). Melgard was below and had been for one-half an hour, but on coming up, about ten minutes before the collision, could see the scow. (30, 31) He testified that the fog was more dense at the time of collision (31). The Master, however, said that at the collision point, it was very clear. (21) The tug was sounding towing signals on her air whistle at the required intervals, or more frequently. (10).

Some three or four (14, 27) or four or five (62) minutes before she came in sight, the "Klickitat" began to hear the fog whistles of a vessel, which afterwards proved to be the "Indianapolis." They seemed to be about forward "somewhere." (16). Seven or eight of these were heard. (62). The "Klickitat" was then making about four miles an hour, which speed she had made all the way across, through fog banks or otherwise. (22). Her Master paid no especial attention to the advancing whistles and took no action whatever in regard thereto, but proceeded at his regular speed until the collision. He testified that he was maintain-

ing a moderate speed, within the rules, and that this was all that was required of him. (22).

Suddenly the "Indianapolis" came out of the fog bank ahead at full speed, about three or four hundred feet away, (11, 15), bearing down on the "Klickitat," slightly from her starboard bow. (17) She blew two whistles, indicating a starboard passage which the "Klickitat" answered (17). There was a look-out on her bow. (20). With her speed unchecked, she was abreast of the tug in a few seconds (11), passed her within the length of a pike pole (24) with her engines in forward motion (24), crossed the tow line two hundred feet back of the "Klickitat's" stern, struck the scow seven feet inside of the port corner and cut off a wedge shaped piece, 7x70, and disappeared in the fog. (62).

Testimony on behalf of the Appellant was given by the Master, mate, engineer and look-out of the "Indianapolis." It tended to prove, that while the "Indianapolis" was not going at full speed, that she was making about fifteen knots in a fog; (37); that her look-out was on her bow; that her mate was on watch in front of the pilot house, and that her Master was in the pilot house, looking out. (40, 47, 51). All three of them heard one tow whistle a-head (40, 47, 52). The Master stopped her engines (40) and the boat slowed down (47, 52). The mate and the Master heard the tug's exhaust substantially right a-head (40, 52). The look-out saw the tug "about half past the star-

board bow." (53). It appeared to the Master that it would be best to make a starboard passage. He blew two whistles, passed on the starboard side, crossed the tow line about two hundred feet back of the "Klickitat" and collided with the port corner of the scow. The Master and engineer both testified that the engines were in reverse motion at the time of the collision (44, 51). All four men agreed that the "Indianapolis" came to a complete stop after the collision. The Master explained his failure to "stand by," by saying that he knew there was no one on the scow; that he had cleared the tug, and that he could render no assistance. After investigating and finding that his own vessel was undamaged, he proceeded with his passengers to Tacoma. (41).

At the close of all of the evidence, Proctor for the Appellant admitted that the testimony of its own witnesses showed that the "Indianapolis" had grossly violated the "moderate speed" branch of Rule 16, but contended that the "Klickitat" was likewise convicted, by the evidence of its own navigators, of violating the other branch of the Rule; and that it had not met the burden of showing that such violations did not contribute to the collision. He also contended that in view of her long tow and the time and place, that she was insufficiently and improperly manned. (6). The Court held that the evidence showed no omission of duty on the part of the Master of the "Klickitat," but that the "Indianapolis" was solely at fault (60). A decree

was duly entered, allowing the Libellant and Intervening Libellant a full recovery against the Appellant and its stipulators, and dismissing the Appellant's libel against the "Klickitat" with costs. (66). From such decree this appeal has been perfected.

SPECIFICATION OF ERROR.

The decree is erroneous in that it assesses the entire recovery against the Appellant and its stipulators and dismisses the libel against the "Klickitat." This follows as a consequence from the primary error of the trial court in finding as follows:

> "I do not find anything in the facts disclosed which would charge the Master of the "Klickitat" with an omission of duty and I think the Court must find that the fault is with the "Indianapolis," and that will be the decree." (Oral decision, Apostles, p. 60.)

The Court should have found that the evidence showed that the Master of the "Klickitat" repeatedly omitted to perform the statutory duty of stopping his engines and navigating with caution, upon repeatedly hearing, forward of his beam, the fog signals of a vessel, the position of which was not ascertained, and, in view of the fact that it was not shown that such omissions could not have contributed to the collision, should have assessed a portion of the Libelant's and Intervening Libelant's damages against the Claimants of the "Klickitat" and their stipulators. In fact, there is ample evidence to support a finding, that had the Master of the tug seasonably performed his statutory duty

no collision would have or could have occurred.

ARGUMENT.

The navigators of the "Klickitat" were aware that there was a vessel under way in the fog ahead long before the "Indianapolis" came in sight. It is true that both Houchen and Melgard testified at the trial that they heard her signals, but three minutes before she came out of the fog, (14, 18, 27) and the Master said he did not hear more than three whistles (16). This evidence, however, was given more than seventeen months after the event.

Libelants' Exhibit I (60) is a marine protest made under oath by Houchen only five days after the collision. Fourteen days after, Melgard swore on oath that he had read it carefully and that all the statements contained in it were true. (64). The protest contains the following statement concerning the point in question:

> "About four or five minutes before she came in sight, affiant heard seven or eight whistles from said steamer, "Indianapolis." (Libelant Ex. I, Ap. 62.)

This exhibit is a self serving document, obviously prepared for use in case of controversy, as, indeed, the event has proved. The statements therein contained were doubtless made as favorable to the "Klickitat" as the facts would possibly warrant. As between two conflicting statements concerning an event, both freely made under oath, by the very same persons one made a few days after the event and the other made seventeen months thereafter,

the first statement will, of course, be regarded as controlling. We assume therefore that the Court will find that the Master of the "Klickitat" heard at least seven or eight fog signals from the "Indianapolis" before she loomed up a-head.

The Master of the "Klickitat" realized that the vessel, sounding these fog signals, was forward of his beam, and that her position was not ascertained. This is conclusively shown by the following question and answer:

> "Q. So, if I understand your testimony correctly, you were coming along here at about four statute miles per hour, and you heard those whistles out ahead of you, somewhere—they seemed to be about forward?"
>
> "A. Yes, somewhere." (16)

He did not stop his engines, or even slow down but kept on going at about four miles an hour and continued at the same speed even after the "Indianapolis" came in sight and in fact until she collided with the scow. (22)

> "Q. Your idea in regard to this is that you were maintaining a moderate speed, within the rules?"
>
> "A. Yes."
>
> "Q. And that was all that was required of you?"
>
> "A. Yes." (22)

The facts here disclosed remarkably parallel the facts disclosed in the litigation over the Beaver-Selja collision. When the opinion of the District

Court in that cause was handed down, it was received with some doubt in marine circles. When this Court affirmed the decision, the underwriters reprinted the opinion and circulated it among vessel owners with an exhortation to them to post placards in the pilot-houses of their vessels bearing the legend, "STOP MY ENGINES." The decisions of the District Court and Circuit Court of Appeals were afterwards affirmed by the Supreme Court of the United States. The three opinions are reported as follows:

Opinion District Court, 197 Fed. 866.

Opinion Circuit Court of Appeals, 219 Fed. 134.

Opinion Supreme Court, 243 U. S. 291.

Reading the three opinions together, we find that when the Beaver became aware of the Selja three minutes before the collision (197 Fed. 869) she was making, according to her own admission, twelve knots, and according to the Selja, fifteen knots per hour. (219 Fed. 136)

At this time the engines of the Selja were stopped and had been for three minutes. Previous to that time, the Selja had been making but three knots for a period of five minutes. All three Courts held that her proceeding at all in the face of the fog signals ahead was a violation of the Rule. The Supreme Court says with reference to the conduct of the Master of the Selja during this period:

"But even then, when convinced that the

danger signals which he had been hearing repeated at one minute intervals for five minutes were from an approaching steamer 'forward of his beam,' he did not obey the rule by stopping his engines, but contented himself with reducing his speed to slow, not out of deference to the rule of law, but because as he says, 'I considered that six knots was not moderate enough under the circumstances,' and this speed be continued for five minutes longer until ten minutes past 3, when, at length he ordered his engines stopped with the result, he is obliged to confess, that at 3:14, two minutes before the collision, his ship still had steerage way upon her, 'was not quite at a standstill,' and a moment later the crash came."

243 U. S. 297.

The District Court said in referring to the conduct of the Selja:

"She thus not only failed to observe the rule on hearing the first whistle, but repeatedly violated it at practically one minute intervals for the succeeding ten minutes."

197 Fed. 867.

Houchen, the Master of the "Klickitat," violated the Rule, according to his sworn statement, seven or eight times. He knew the on-coming vessel was "somewhere ahead" just as Captain Lie of the Selja did. He thought that "maintaining a moderate speed was all that was required of him,"

just as Captain Lie did, but his position is not as strong as Lie's was for Lie, when the whistles got close, slowed to three knots and then stopped his engines six minutes before the collision, while Houchen maintained his regular speed of about four miles an hour until the very moment of the collision.

At the trial in the District Court, the proctors for the "Klickitat" strongly argued the doctrine of major and minor fault, relying upon the excessive speed of the "Indianapolis." In the Beaver-Selja case, the Beaver was running in a fog at from 12 to 15 knots an hour (219 Fed. 136) yet the District Court said:

> "Nor is there room here for the application of the so-called major and minor fault doctrine. Both vessels were equally at fault. The Beaver violated the first part of Rule 16 by going at an immoderate rate of speed, and the Selja was at fault for failing to observe the latter clause of the Rule. One was as great a breach of duty as the other."
>
> 197 Fed. 869.

This language was not criticised by either of the Appeal Courts. In fact the Supreme Court intimates that a breach of the second part of the Rule may be a greater breach of duty than a breach of the first part thereof.

> "The most cursory reader of this rule must see that while the first paragraph of it gives the navigator discretion as to what shall

be 'moderate speed' in a fog, the command of the second paragraph is imperative, that he shall stop his engines when the conditions described, confront him."

243 U. S. 296.

We submit that in holding that the Master of the "Klickitat" omitted no duty, the Trial Court was seriously in error. The rule of the Beaver-Selja cases applied to the master's own sworn statement, shows that he breached an imperative statutory duty, seven or eight times.

NO SHOWING THAT THE "KLICKITAT'S" BREACHES OF DUTY DID NOT CONTRIBUTE TO THE COLLISION.

This Court said in its opinion in the Beaver-Selja case:

> "As pointed out by the Trial Court, the law is that, where a vessel has committed a positive breach of statutory duty, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so."

219 Fed. 138.

This rule is also quoted in the Supreme Court opinion. As no attempt whatever was made to make such a showing, this is as far as it is necessary for us to go. It may be well to point out, however, that so far from the "Klickitat" having sustained that burden, it is perfectly apparent that had she observed the statutory rule the "Indianapolis" would have necessarily passed the point of collision before she reached it.

The vessels were, as shown in the evidence, on slightly crossing courses. The testimony of all six witnesses agreed that the "Klickitat" herself had just reached the point of intersection when the "Indianapolis" came out of the fog bank three hundred feet away. The look-out of the "Indianapolis" says when he caught sight of the "Klickitat," she was just "half-past" their bow (53). The "Klickitat" could not have materially changed her position or the position of the scow in the very few seconds it took the "Indianapolis" to cover three hundred feet. The "Indianapolis" judged it best to attempt a starboard passage. This bending her course to port would diminish the angle between the courses, yet even while swinging to port, she crossed the tow line two hundred feet back of the tug and struck the scow seven feet inside the port corner. It follows conclusively that had the tug been where the scow was, there could have been no collision for the "Indianapolis" even though bending her course to port, passed eight feet to starboard of the center line of the scow. It is almost a foregone conclusion that had the tug advanced but one hundred feet less than she actually did, that the "Indianapolis" would have had a clear way across her bow. In fact, as it was, the Master of the "Klickitat" claims that the "Indianapolis" should have taken that course (17). Furthermore, as it was fairly clear where the tug and tow were, she would have had four hundred instead of three hundred feet to manoeuver in.

The "Klickitat" was making four miles an hour. In the four or five minutes after she first heard the fog signals of the "Indianapolis," she therefore advanced 1408 feet or 1760 feet as the case may be, that is, from a fourth to a third of a mile. She could not possibly have reached the intersection had she stopped her engines on the first, second, third, or even the fourth fog signal, for the heavy square nosed scow, laden with 144,000 feet of lumber with the two big floats trailing out behind, would have of necessity become a drag upon her at once. Had the tug cut down the distance it actually made by even a fifth, the collision could not possibly have occurred, and it is practically certain that it would not have occurred had it cut down the distance even a tenth.

For the foregoing reasons, we respectfully pray that the decree appealed from, be reversed and that the Court order a new decree to be entered assessing one-half of the damages against the Claimants and Stipulators of the "Klickitat" and that the Court will make such orders in regard to costs as to it may seem just.

Respectfully submitted,

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